(2)

NO. 91-727

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,
Petitioner,

vs.

EDWARD C. NICHOLS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May an employer avoid an action by an employee to collect wages due under a state's wage payment law simply by contending that its reason for refusing to pay wages was one that is forbidden by § 7 of the National Labor Relations Act and that the claim is therefore preempted by NLRA?

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CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at 408 S.E.2d 237.

STATEMENT OF THE CASE

Respondent Edward C. Nichols was, in August 1986, elected manager of the Catawba Valley Joint Board, a subsidiary organization of the petitioner Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Respondent was elected by delegates to the Joint Board who represent various local unions of the respondent located in South Carolina and North Carolina. These local unions comprise the membership of the Joint Board.

Even though a joint board manager is elected by delegates to the Joint Board, petitioner has routinely placed Joint Board managers in its Southern Region on the payroll as employees of the petitioner and has paid their salaries. Following respondent's election, however, petitioner refused to compensate respondent for his services as Joint Board manager. Respondent's predecessor, on the other hand, was an employee of petitioner for his entire three-year term.

Some employees of petitioner are represented for collective bargaining purposes by a separate union, the Federation of Union Representatives (FOUR). However, Joint Board managers are recognized by petitioner and by FOUR to be managerial employees outside the bargaining unit represented by FOUR. The Joint Board position to which respondent was elected had no connection to FOUR or its collective bargaining relationship with petitioner or to any other aspect of collective bargaining. On the contrary, the position of Joint Board manager is excluded from the bargaining unit because the manager is recog-

nized to be a managerial employee. Record, pages 189-190.

The sole factual issue presented here is whether, under South Carolina law, respondent became an employee of the petitioner when he was elected to the position of Joint Board manager. Petitioner has at all times acknowledged that, should respondent be found to be its employee, it would be obligated to pay him wages under the South Carolina wage payment law, S.C. Code § 41-10-40. However, it has sought to avoid having a state court jury resolve the single factual issue of his employment, even though the issue presents a pure question of state law.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because there exists no conflict between the decision under review and decisions by this Court and because the case presents no important questions of federal law. On the contrary, this case presents a unique factual and legal situation which will not affect persons or entities other than the parties.

Petitioner makes no contention that there exists any conflict with any lower federal or state courts. In view of the number of states that have wage payment laws, the absence of any case conflicting with the decision here shows at the very least that the decision does not have the cosmic significance attributed to it by petitioner.

Contrary to petitioner's assertion, there exists no conflict between this case and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The South Carolina Supreme Court correctly applied *Garmon* to the unusual facts of this case. The state law said by petitioner to be preempted requires the payment of wages, an area of labor relations which is within the area traditionally left to state regulation, and the South Carolina Supreme Court appropriately relied on *Garmon* and subsequent decisions by this Court that such claims are not preempted, even if they are otherwise arguably within the jurisdiction of the National Labor Relations Board.

Moreover, *Garmon* applies only "[w]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 . . . or constitute an unfair labor practice under § 8." 359 U.S. at 244. Petitioner has failed even to meet its threshold requirement of showing that respondent's conduct was within the arguable jurisdiction of the Board. The petition for certiorari is completely silent as to both the legal and factual basis for contending that respondent's claim is within the arguable jurisdiction of the Board. In fact, there is no colorable NLRA claim, both because a Joint Board manager is exempted from the protection of the Act and because there are no activities which § 7 of the National Labor Relations Act, 29 U.S.C. § 157, protects or which are made illegal by § 8, 29 U.S.C. § 158. There is no conflict where the state claim is not within the arguable jurisdiction of NLRB.

I.
THE DECISION APPROPRIATELY RECOGNIZES THE IMPORTANT STATE INTERESTS INVOLVED IN A STATE'S WAGE PAYMENT ACT

The decision of the South Carolina Supreme Court does not conflict with *Garmon* or decisions construing *Garmon*. On the contrary, it is consistent, finding no preemption where a state statute regulates an area which is traditionally left to state regulation, either because the activity is of only peripheral concern of the Act or because it is so "deeply rooted in local feeling and responsibility." 359 U.S. at 244.

A. The State Law Claim is Not Preempted Because It Involves an Area Traditionally Left for Regulation by the States.

Beginning with *Garmon*, the Court has recognized that due regard for our federal system requires that certain categories of cases are not preempted by the Act, even though they otherwise fall within the arguable jurisdiction of the Board.[1] *Garmon* recognizes that considerations of federalism require that the states be allowed to regulate those areas which fall within spheres traditionally left to the states.

> However, due regard for the presuppositions of our embracing federal sys-

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[1]As pointed out in Part II of this Brief, this case does not even fall within this category of cases, because petitioner has failed to make any showing that respondent's claim is within the Board's jurisdiction.

> tem, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Id., 359 U.S. at 243-244 (footnote and citation omitted).

It would be difficult to conceive of an area of employer-employee relations more "deeply rooted in local feeling and responsibility" than that of ensuring that a state's citizens receive wage payment. Indeed, the South Carolina Supreme Court nearly 30 years ago characterized the payment of wages as an issue which "is a matter of legitimate State concern and of *compelling State interest*." *Kimbrell v. Jolog Sportswear Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962) (emphasis added).

The decision in this case reaffirms South Carolina's interest in protecting this important right as a matter of state law. Petitioner's dismissal of the South Carolina Supreme Court's description of the

importance of this prerogative as "an insubstantial and rote incantation of language in *Garmon*," see Petition for Certiorari, at page 18, ignores the South Carolina court's long standing recognition in *Kimbrell* of this obvious State interest.

This Court has continued to defer to such important state interests in finding no preemption.

> On the other hand, because Congress has refrained from providing specific directions with respect to the scope of preempted state regulation, the Court has been unwilling to "declare preempted all local regulation that touches or concerns in any way the complex interrelationship between employees, employers and unions."

Farmer v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 430 U.S. 290, 295-296 (1977), quoting *Amalgamated Ass'n. of Street, Electric, Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971).

In *Belknap Inc. v. Hale*, 463 U.S. 491, 509 (1983), the Court said:

> Under *Garmon*, a State may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law.

Accord, *International Longshoremen's Ass'n. v. Davis*, 476 U.S. 380, 392-393 (1986). Petitioner cites *Belknap Inc. v. Hale* and *Davis* as further examples of conflict with the South Carolina Supreme Court, even though the Court found no preemption in both cases. In *Lockridge*, the final case cited as being in conflict with the decision here, the Court found preemption arising out of internal union procedures. Petitioner makes it clear, however, that it is here as an employer, not as a union. Petition for Certiorari, page 28. There is thus no conflict.

These cases recognize that in the case of such state statutes, the usual rules of preemption do not apply, and that there must be some specific Congressional direction of intent to preempt such state law. Petitioner has failed to identify any such "compelling congressional direction." It follows that South Carolina's wage payment law is appropriately left for state regulation and that it is not preempted. Respondent's claim falls squarely within this precedent. A state's law requiring payment of wages is precisely the type of law subject to this doctrine; it is a minimum employment standard falling within the traditional prerogative of the states.

Petitioner's position, if accepted, would result in the creation of a completely new doctrine of preemption not found in any of this Court's decisions. It would effectively preclude state courts from enforcing their wage payment laws upon an employer's simply invoking § 7 and § 8. Such an extreme position is not supported by any of the Court's prior cases and is not supported by any showing of the requisite Con-

gressional statement of intent to do so.

B. The State Law Claim Requires Different Proof from the Putative Unfair Labor Practice Claim.

The foregoing discussion is reenforced by the fact that respondent's state law claim requires a wholly different factual and legal showing from the putative NLRA claim. The South Carolina Supreme Court recognized that the requisite elements of a claim under NLRA are not presented here, where respondent needs only to establish his employee status in order to recover under state law. *Adamson v. Marianne Fabrics Inc.*, 301 S.C. 204, 391 S.E.2d 249, 250-251 (1990). See also *Cook v. Georgetown Steel Corp.*, 770 F.2d 1272, 1275 (4th Cir. 1985). Petitioner's motive for its refusal to pay respondent's wages is wholly irrelevant. Indeed, the South Carolina Supreme Court explicitly directed the trial court not to consider factors that a claim under NLRA would present:

> In fact, we specifically instruct that the circuit court should not consider any alleged retaliatory motivation on the part of the union nor any other conduct of the union outside of a breach of contract analysis as was allowed in *Belknap* and *Gonzales*.

Petition for Certiorari, page A-12.

In order to sustain a claim under NLRA, re-

spondent would be required to show that petitioner was motivated by an intent to deprive him of rights protected by § 7, i.e., that petitioner had interfered with, restrained or coerced respondent in the exercise of rights guaranteed by § 7. While this inquiry is totally hypothetical, since petitioner has never, in the protracted history of this litigation, identified what activity was protected by § 7, it is clear that petitioner's action would be illegal under NLRA only if petitioner has interfered with or restrained such a right, in violation of § 8. That would be the critical inquiry in any proceeding before the Board.

In order to avoid this incontrovertible distinction, petitioner relies solely on respondent's having characterized in his deposition his claim under South Carolina law as being the "same claim" as was presented to the Board. Petition for Certiorari, pp. 29-30. While it may be true, from a lay point of view, that the two claims are the same, in the sense that they arise out of the same factual situation, they are dramatically different both in terms of what facts are required to prove each claim and what legal tests apply. It is not the "same case" under this Court's cases.

The South Carolina Supreme Court therefore decided this case consistently with *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1977), where the Court, in finding no preemption, said that the inquiry is whether the controversy presented to the state court is identical to or different from that which could have been presented to the Board. 436 U.S. at 197. It is only

the former situation, where the state court's exercise of jurisdiction necessarily involves a risk of interference with the Board's jurisdiction over unfair labor practices, that the "arguably protected branch of the *Garmon* jurisdiction was designed to avoid." 436 U.S. at 197.

In *Farmer v. United Brotherhood of Carpenters and Joiners*, the plaintiff brought an action against a union for intentional infliction of emotional distress in connection with the union's refusal to refer him for employment. Even though the union's refusal to refer could have been an unfair labor practice, depending on the union's motivation, the Court held that the claim was not preempted because the state court and the Board would be adjudicating different issues.

> If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of union officials discriminated against him in employment referrals for reasons other than failure to pay union dues . . . . Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the damages for pain, suffering or medical expenses. Conversely, the state court tort action can be adjudicated without resolution of the "merits" of the under-

> lying labor dispute. Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress . . . . The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context.

430 U.S. at 304-305. Accord, *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966) (action for libel). Similarly, in *Belknap Inc. v. Hale*, *supra*, the fact that the issue which would have to be resolved by the Board was different from that which the state court would have to resolve in adjudicating a breach of contract claim. 463 U.S. at 510.

The South Carolina Supreme Court correctly recognized that the factual issue presented in this action in no way depends on any determination of whether petitioner has interfered with the exercise of rights protected by NLRA. The only dispute is whether respondent was an employee of petitioner, a factual question which is completely divorced from the questions which the NLRB would have to resolve, and which is exclusively an issue of state law. See

Petition for Certiorari, pages A-14-15.

II.
PETITIONER HAS MADE NO SHOWING THAT RESPONDENT'S CLAIM IS ARGUABLY WITHIN THE JURISDICTION OF NLRB

Because *Garmon* applies only "when it is clear or may fairly be assumed that the activities which the state purports to regulate are protected by § 7 . . . or constitute an unfair labor practice under § 8," there can be no conflict with *Garmon* where the claim does not meet this test. Preemption is not presumed, and in order to be entitled to avail itself of the defense, petitioner has the affirmative obligation to make a specific legal and factual showing that respondent's claim falls within the Board's jurisdiction.

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that

> has not been "authoritatively rejected" by the courts or the board. *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 184 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

International Longshoremen's Ass'n. v. Davis, *supra*, 476 U.S. at 394-395. The petition is devoid of any such showing, and that void is itself grounds for denying the petition. The discussion that follows will demonstrate why petitioner has substituted conclusory assertions of "arguably protected" for the showing that *Davis* requires.

Petitioner has failed to suggest "an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the board." 476 U.S. at 395. The Petition invokes the rubric of "hiring discrimination," but it fails to show how such "hiring discrimination" is related to activities made illegal by § 8. It mentions in passing that the action protected by § 7 is "running for office," Petition for Certiorari, at page 16, even though it later protests that it is in this Court as employer, not as union. Petition for Certiorari, page 28.

Possibly even more significantly, petitioner fails even to mention, much less discuss, the fact that respondent's position as Joint Board manager has been conclusively determined to be a managerial

position, outside the protection of the Act.

Because this Court has so consistently found no preemption in cases involving areas traditionally regulated by state law, even though they are otherwise arguably within the jurisdiction of NLRB, the South Carolina Supreme Court found it unnecessary to determine whether respondent's claim was arguably within the Board's jurisdiction. Had it done so, however, petitioner would have failed to make the required showing on either of two grounds.

A. *The Joint Board Manager Position is a Managerial Position, Excluded from Coverage by the Act.*

There can be no preemption where the employee is in a position over which the Board has no jurisdiction. A state law claim by such a person is not preempted, even if his activities would otherwise have been protected by § 7. *Hanna Mining Co v. District 2, Marine Engineers Beneficial Ass'n.*, 382 U.S. 181, 188 (1965); *International Longshoremen's Ass'n. v. Davis, supra*, 476 U.S. at 394. There is no threat of "conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Amalgamated Ass'n. of Street, Electric Railway and Motor Coach Employees of American v. Lockridge, supra*, 403 U.S. at 285-286.

NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974) held that Congress intended to exclude managerial employees from NLRA coverage. Respondent's position as joint board manager is such a position.

An arbitration decision to which petitioner was a party and which relied on the construction of NLRA and not just on contract language, and which was submitted for arbitration in lieu of a determination by the NLRB as to whether joint board managers were within the bargaining unit, explicitly found that joint board managers are managerial employees. The arbitrator held:

> By virtue of the *Bell Aerospace* decision it is now enough to warrant exclusion [of Joint Board managers from a bargaining unit] that the employees in question are truly "managerial employees." They function as "middle management." They exercise a good deal of independent judgment in the day-to-day function of the organization at the Joint Board level. They have the power to commit its funds. They are in every sense "managers," not only in title but in function. They are in no way just "working leaders." Without them, there would be no one in the organizational structure to conduct the affairs of the International Union and of the Joint Boards at their levels.

Record, pages 189-190. Petitioner's failure to address this finding is presumably explained by its recognition that it presents a fatal blow to its theory of preemption. Because the record is uncontradicted that respondent was a managerial employee, it follows that his claim is not preempted.

B. There Is No Showing that Respondent's Actions Were Within the Range of Those Protected by § 7.

The rights protected by the Act are set forth in § 7, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) of NLRA, 29 U.S.C. § 158(a)(1) makes it an unfair labor practice for an employer

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Not every matter dealing with employer-employee relations falls within the Board's jurisdiction, and § 7 and § 8 do not regulate the internal affairs of labor unions where they are unrelated to the terms

and conditions of employment. Petitioner has failed to satisfy the *Davis* requirement that it "demonstrate that [respondent's] case is one that the Board could legally decide in his favor." *Id.*, at 395. The Petition is silent as how respondent's running for union office brought him within the arguable jurisdiction of NLRB.

The Act protects collective bargaining and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In order to show preemption, petitioner must show both (1) concerted activities which are (2) undertaken for the purpose of collective bargaining or other mutual aid and protection. *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984); *Meyers Industries Inc.*, 281 NLRB No. 118, 123 LRRM 1137, enfd, 835 F.2d 1481 (D.C.Cir. 1987), cert.den., 487 U.S. 1205 (1988). Petitioner fails to make even a suggestion that either test has been satisfied.

Petitioner has never identified in what respect respondent's running for union office was concerted activity as defined by the Act. It has not asserted that respondent acted with or on behalf of any other employees. Indeed, there has been no assertion that any other employees of the petitioner were connected with petitioner's actions. There is no showing that respondent's activities in running for office within the union were in any way related to or affected the process of collective bargaining or other concerted protected activities.

Similarly, petitioner has failed to make any

showing that respondent's actions were directed to the "mutual aid and protection" of other employees of the petitioner. The "mutual aid or protection" language addresses activities by employees "to better their working conditions." *Eastex Inc. v. NLRB*, 437 U.S. 556, 567 (1978). Petitioner offers no suggestion as to how running for union office is related to improvement of working conditions.

Conclusion

The Petition fails to demonstrate the existence of a conflict with *Garmon*. Likewise, it fails to show that the unique facts of this case present any question of important federal law justifying the Court's consideration. The Court should deny the petition.

Respectfully submitted,

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